PRIZE CASES IN THE ENGLISH COURTS ARISING OUT OF THE PRESENT WAR.[1]

Sixty years ago the British Prize Courts adjudicated cases growing out of the Crimean War. Since that time no British Court has sat as a Prize Court until the present war. During the same period, however, a considerable body of decisions have been made, in this country by the United States Courts in the Civil War and the Spanish-American War, and in Russia and Japan by their Prize Courts in the Russo-Japanese War.

In the United States, neither the Constitution nor the Judiciary Act of Sept. 24, 1789 contains an *explicit* grant of jurisdiction in matters of prize. The United States District Courts, however, as courts of admiralty, possess jurisdiction as courts of prize.[2] This jurisdiction is now statutory, being at present embodied in § 24 of the Federal Judicial Code, Act of March 3, 1911, by which the United States District Courts are given original jurisdiction "of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize." By § 238 of the same statute, the United States Supreme Court is given jurisdiction of appeals, taken direct to that Court, "from the final sentences and decrees in prize causes." In interpreting these same words in the Act of March 3, 1891, the Supreme Court held in *The Paquete Habana*[3] that this appellate jurisdiction is not dependent on the amount involved, nor on the granting of a certificate by the District Court as to the importance of the case. The

[1]It would be presumptuous to attempt to discuss the general subject of prize and contraband in view of the erudite and authoritative treatment of these two subjects in John Bassett Moore's International Law Digest (1906) chapters 24, 25 and 26. Since the publication of that work, however, the decisions of the Japanese and Russian Prize Courts in the Russo-Japanese War have become available in English, the Second Hague Conference has been held, and the Declaration of London has been adopted by the International Naval Conference at London, Feb. 26th, 1909. The purpose of this article is to discuss, with such notes as may seem necessary, the principles involved in decisions in prize cases in the English courts arising out of the present war.

For extended notes on the principles and practice in prize cases, see 1 Wheaton, Appendix, pp. 494-506, 2 Wheaton, Appendix, pp. 1-80, and Pratt's, Story, Notes on the Principles and Practice of Prize Courts. See also on prize practice, Benedict, Admiralty (4th ed.) c. 41.

[2]Glass *v.* The Sloop Betsey (1794) 3 Dall. 6, 16; The Amiable Nancy (1818) 3 Wheat. 546, 557, 558.

[3](1899) 175 U. S. 677.

Supreme Court does not possess original jurisdiction in matters of prize.[4]

In England, by § 4 of the Supreme Court of Judicature Act, 1891, the High Court of Justice was declared to be a Prize Court, having all the jurisdiction possessed by the former High Court of Admiralty when acting as a Prize Court,[5] and, subject to rules of court, all causes and matters within the jurisdiction of the High Court as a Prize Court are assigned to the Probate, Divorce and Admiralty Division of the Court. In addition to this statutory grant of prize jurisdiction, a Commission was issued by the Crown at the beginning of the present war to the High Court of Justice authorizing and requiring it "to take cognizance of and judicially to proceed upon all and all manner of captures, seizures, prizes and reprisals of all ships, vessels and goods that are or shall be taken, and to hear and determine the same; and according to the course of admiralty and the law of nations, and the statutes, rules and regulations for the time being in force in that behalf, to adjudge and condemn all such ships, vessels and goods as shall belong to the German Empire or the citizens or subjects thereof, or to any other persons inhabiting within any of the countries territories or dominions of the said German Empire, which shall be brought before you for trial and condemnation." A separate Commission was issued with reference to vessels and cargoes belonging to Austria-Hungary or the citizens, subjects or inhabitants thereof.[6]

By § 4 of the Supreme Court of Judicature Act, 1891, it is provided that any appeal from the High Court when acting as a Prize Court shall lie only to His Majesty in Council. In addition to the existing Vice-Admiralty Courts in the colonies, the King was, by Act of September 18, 1914, authorized to confer jurisdiction in matters of prize on the Supreme Court in Egypt, the Court in Zanzibar and the Supreme Court in Cyprus, co-extensive with the jurisdiction of Vice-Admiralty Prize Courts. Appeals from any Prize Court within His Majesty's Dominions are taken direct to His Majesty in Council.[7]

In the courts of both England and the United States, the procedure in prize cases is established by statutes and special rules. In England the law of procedure is found in The Naval

[4] The William Bagaley (1866) 5 Wall. 377, 412.

[5] § 4, The Naval Prize Act, 1864.

[6] The Roumanian [1915] P. 26, 41, 42.

[7] § 5, The Naval Prize Act, 1864.

Prize Act, 1864, as amended by The Prize Courts Act, 1894, and The Prize Courts (Procedure) Act, 1914, and supplemented by rules promulgated by Order in Council dated August 5, 1914, under the authority granted by § 3 of The Prize Courts Act, 1894. The United States statutes dealing with proceedings for condemnation of prize are contained in the Revised Statutes §§ 4613-4629, 4636-4652, and 1009. The prize rules of the United States District Court for the Southern District of New York appear in Benedict's Admiralty.[8]

Standing interrogatories to be addressed by a prize commissioner to masters, officers, and members of the crew of the captured vessel and to all who were on board at the time of capture, *in preparatorio,* appear in 2 Wheaton, appendix, 81. Preparatory interrogatories for the Southern District of New York are given in Benedict's Admiralty.[9] The standing interrogatories used in the English High Court of Admiralty at the close of the eighteenth century are given in 1 C. Robinson, 381.

The first prize case arising out of the present war, to be argued and decided in the English Courts, was that of *The Chile.*[10] The question involved was the right of one belligerent to seize the merchant vessels of an enemy, which were in the ports of the former on the outbreak of war. On August 4, 1914, the German barque *Chile,* of Bremen, arrived at Cardiff in ballast; at 11 P. M. on the same day war was declared between Great Britain and Germany; and on August 5 the barque was detained by the Collector of Customs at Cardiff. It was held that the barque was a merchant vessel belonging to Germany, an enemy country, and that by international law The Crown was entitled to seize the ship although she was in port before the commencement of hostilities. The claim and appearance of the owners of the barque was stricken out on the ground that the test affidavit presented by their agents did not disclose the name of the owners, and did not show any grounds entitling them as alien enemies to appear in a British Court.

In the absence of treaty provision or a proclamation by one belligerent granting days of grace for the departure from its ports of merchant vessels belonging to the enemy, the right of a belligerent to seize and condemn all merchant vessels of the enemy found

[8](4th ed.) 535.

[9](4th ed.) 641.

[10][1914] P. 212, in the Probate, Divorce & Admiralty Division of the High Court of Justice, Sept. 4, 1914.

within its ports at the outbreak of war is undoubted.[11] Prior to the declaration of war by Great Britain against the Batavian Republic in 1803, the former laid an embargo on all Dutch ships then in her ports and seized them.[12] A similar embargo was proclaimed and enforced by Great Britain against vessels of the United States in anticipation of the War of 1812.[13]

The exemption of all private property from capture at sea as well as on land, has been urged by the United States, but the principle has not received general recognition. Article XII of the treaty between the United States and Italy, February 26, 1871, however, contains the provision that in the event of war between these two countries, the private property of their respective citizens and subjects, with the exception of contraband of war, and vessels and cargoes attempting breach of blockage, shall be exempt from capture or seizure, on the high seas or *elsewhere.*

In the Crimean War, Great Britain, by Order in Council, published March 29, 1854, the date on which war was declared between Great Britain and Russia, allowed to all Russian merchant vessels, in any ports or places within Her Majesty's dominions, six weeks from that date for loading their cargoes and departing, and such vessels if met at sea were ordered to be permitted to continue their voyages, provided they did not have on board contraband, an officer in the military or naval service of the enemy or any despatch of or to the Russian Government.[14] France also allowed six weeks from the date of her proclamation, March 27, 1854, to Russian ships of commerce to leave the ports of France, and to Russian ships not actually in French ports, or which had left Russian ports previous to the declaration of war, to enter into French ports and remain there for the completion of their cargoes.[15] Russia allowed English and French vessels six weeks from April 25, 1854, to load their cargoes and depart from Russian ports in the Black Sea, the Sea of Azof, and the Baltic, and six weeks from the opening of navigation to depart from ports in the White Sea.[16]

[11]The Johanna Emilie (1854) Spinks, Prize Cases, 12, 14; The Lesnik (1904) Russian and Japanese Prize Cases, Vol. 2, p. 92; The Kotik (1904) *id.*, p. 103.

[12]The Vrow Sarah, 2 Eng. P. C. 185, note; The Planters' Wench (1803) 5 C. Rob. 22. See also the Order in Council of March 6, 1665 in 1 C. Rob. 230, note, and The Gertruyda (1799) 2 C. Rob. 211.

[13]The Belvidere (1813) 1 Dods. 353.

[14]See The Fenix (1854) Spinks, 1, and Appendix D.

[15]Moore, Int. Law Digest, § 1196.

[16]Moore, Int. Law Digest, § 1196.

In the Spanish-American War the United States allowed thirty days from the declaration of war to Spanish merchant vessels in any ports or places within the United States for loading their cargoes and departing, and such vessels were by proclamation of the President allowed to continue their voyages provided they did not have on board any officer in the military or naval service of the enemy, or any coal, except an amount necessary for the voyage, or any contraband or any despatch of or to the Spanish government.[17] Spain allowed five days from April 23, 1898, the date of her decree, for the departure of United States merchant ships from Spanish ports, but the decree did not prohibit the capture of such ships after departure. No captures were made, however, by Spanish vessels.[18]

In the Russo-Japanese War, Japan allowed seven days from the date of the ordinance, February 9, 1904, to Russian merchant ships then lying in Japanese ports, to discharge or load their cargoes and depart, and such ships were by the ordinance exempt from capture if they sailed direct to the nearest Russian port, or to their original destination, provided they did not have on board contraband or Russian despatches. Japanese merchant vessels in Russian ports on the declaration of war were allowed not exceeding forty-eight hours from the time of publication of the Russian declaration (dated February 14, 1904) by the local authorities.[19]

The Japanese Prize Court at Sasebo, and the Higher Prize Court on appeal, held that this period of grace was not extended beyond the seven days in the case of a Russian vessel undergoing hull repairs in a Japanese port and without a crew.[20] In like manner, where the declaration of blockade of Confederate ports, declared by President Lincoln April 27, 1861, gave fifteen days after establishment of the blockade for neutral vessels to depart, a British vessel departing after the time allowed was condemned, although her departure within the time allowed was prevented by her inability to get a tug to tow her down the James River from Richmond to sea.[21]

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[17]Moore, Int. Law Digest, § 1196. See The Buena Ventura (1899) 175 U. S. 384, and The Panama (1899) 176 U. S. 535.

[18]Moore, Int. Law Digest, § 1196.

[19]Takahashi, International Law Applied to the Russo-Japanese War, 64, 65; Moore, Int. Law Digest, § 1196; Russian and Japanese Prize Cases, Vol. 1, p. 347, and Vol. 2, p. 445.

[20]The Manchuria (1905) Takahashi, 596, 598, Russian and Japanese Prize Cases, Vol. 2, p. 100.

[21]Prize Cases (1862) 2 Black, 635, 675.

Articles 1 and 2 of the Hague Convention VI (1907), dealing with the status of enemy merchant ships at the outbreak of hostilities, are as follows:

"Art. 1. When a merchant ship belonging to one of the belligerent powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace, and to proceed, after being furnished with a pass, direct to its port of destination or any other port indicated to it.

"The same principle applies in the case of a ship which has left its last port of departure before the commencement of the war and has entered a port belonging to the enemy while still ignorant that hostilities have broken out.

"Art. 2. A merchant ship which, owing to circumstances beyond its control, may have been unable to leave the enemy port within the period contemplated in the preceding article, or which was not allowed to leave, may not be confiscated.

"The belligerent may merely detain it, on condition of restoring it after the war, without payment of compensation, or he may requisition it on condition of paying compensation."[22]

The United States delegates did not sign this convention, on the ground that it was an unsatisfactory compromise,[23] nor was it submitted to the Senate for ratification.[24]

In *The Chile* the Attorney General asked merely for an order of detention of the vessel, pending inquiries as to the reservations which the German government had made to the articles of the Hague Convention above quoted, and the decree was that the barque had been lawfully seized as good and lawful prize, and that she should be detained by the marshal until further order of the Court.

No agreement was subsequently reached between Great Britain and Germany as to days of grace applicable to vessels of one belligerent found in the ports of the other belligerent on the outbreak of the war, and all such vessels, therefore, presumably will be condemned.

The striking out of the claim and appearance of the owners of *The Chile* was in accord with the early authorities. It has been held that an enemy cannot appear as claimant in a prize proceeding unless it appears by his affidavit that he comes under a flag of truce, a cartel, a license, or some other act of public authority,

[22]The full texts of the Hague Conventions of 1899 and 1907 are given in Scott, The Hague Peace Conferences of 1899 and 1907, Vol. 2.

[23]Stockton, Outlines of International Law (1914) 343.

[24]Scott, The Hague Peace Conferences, Vol. 2, p. 421.

suspending his hostile character.[25] Thus if an enemy's ship is captured within the territorial waters of a neutral country, the claim must be made, not by the enemy owner, but by the neutral government.[26] The consul of such neutral government cannot make claim *virtute officii,* without special authorization, but it would be otherwise in case of claim by a diplomatic representative.[27] A capture made within neutral waters is valid as between belligerents.[28] On the return of peace the owner may appear as claimant in a pending cause.[29] But where an American vessel was condemned in 1809 by the Vice-Admiralty Court of Grenada and an appeal taken to the High Court of Admiralty, the owner's appeal was dismissed on the breaking out of the War of 1812.[29a]

Under ordinances granting days of grace, and by the provisions of The Hague Convention and the Declaration of London, exemptions, either total or partial, are provided. How is an enemy owner of a vessel, not having his hostile character suspended, to urge the applicability of an exemption in favor of his vessel, if he cannot appear in the prize proceedings? This question was discussed and settled in the subsequent case of *The Möwe.*[30] A merchant sailing vessel of Rhandermoor, Germany, owned by her master, a German, was captured on the morning of August 5, 1914, while proceeding up the Firth of Forth, and was brought into Leith. The master did not know of the outbreak of war when his vessel was captured. An appearance was entered by him as owner of the vessel. He claimed that under Articles 1 and 2 of The Hague Convention VI (1907)[31] his vessel should not be con-

[25]The Hoop (1799) 1 C. Rob. 196, 200, 201; The Panaja Drapaniotisa (1856) Spinks, 337. The usual form of claim and affidavit appears in a note to the report of the latter case in 2 Eng. Prize Cases, at p. 563.

[26]The Vrow Anna Catharina (1803) 5 C. Rob. 15; The Eliza Ann and others (1813) 1 Dods. 244; The Twee Gebroeders (1800) 3 C. Rob. 162; The Twee Gebroeders (1801) 3 C. Rob. 336; The Florida (1879) 101 U. S. 37, 42.

[27]The Anne (1818) 3 Wheat. 435.

[28]The Anne, *supra*; The Adela (1867) 6 Wall. 266; The Sir William Peel (1866) 5 Wall. 517, 535. The Ship Richmond (1815) 9 Cranch, 102, an American vessel seized in Spanish waters for breach of Non-intercourse Act. The De Fortuyn (1760) Burrell, 175, a Dutch (enemy) ship captured in a Spanish (neutral) port over the protest of the Spanish governor, held liable to confiscation, but under the circumstances her value was restored to the owner.

[29]The Anne, *supra.*

[29a]The Charlotte (1813) 1 Dods. 212.

[30][1915] P. 1, in the Probate, Divorce & Admiralty Division of the High Court of Justice, Nov. 9, 1914.

[31]*Supra,* p. 321.

demned, but merely detained during the war. After citing authorities holding that an enemy has no standing in court, the Court held that in all fairness an alien enemy owner should be allowed to urge such an exemption in favor of his vessel, and declared a new rule of practice, *viz.*: that whenever an alien enemy conceives that he is entitled to any protection, privilege, or relief under any of The Hague Conventions of 1907, he shall be entitled to appear as a claimant and to argue his claim before the court, provided that the grounds of his claim be stated in the affidavit accompanying his appearance.

This rule is in accordance with the practice of the United States Courts in cases which involved claims for immunity under the President's Proclamation of April 26, 1898, made by the owners of Spanish vessels captured in the Spanish-American War,[32] or claims for immunity under the principles of international law.[33] The same practice was followed in cases arising out of the Russo-Japanese War, in both Russian and Japanese Prize Courts, where claims were made for immunity under the ordinances allowing days of grace or under the principles of international law.[34] If claim is made on the ground that the owner is a neutral, restitution cannot later be claimed on the ground that the owner is an enemy within the exception of an ordinance allowing days of grace.[35]

The next reported decision is *The Marie Glaeser,*[36] involving claims of a mortgage and maritime liens against an enemy's vessel. On August 1, 1914, the German steamship *Marie Glaeser,* of Rostock, owned by a limited liability company of Rostock, left Bristol for Archangel in ballast. On August 4 she put into Barry for bunker coal, and left the same day at 1 P. M. On August 5 she was captured at sea, her master being then ignorant of the declaration of war, and was brought into Glasgow for condemnation. Appearances were entered on behalf of (1) the owner, (2) separate shareholders in the ship, (3) the mortgagee, a Dutch

[32]The Pedro (1899) 175 U. S. 354; The Guido (1899) 175 U. S. 382; The Buena Ventura (1899) 175 U. S. 384; The Panama (1900) 176 U. S. 535.

[33]The Paquete Habana and The Lola (1900) 175 U. S. 677.

[34]The Möwe was condemned on the ground that she had been captured not in a port, but at sea.

[35]The Johann Christoph (1854) Spinks, 60.

[36][1914] P. 218, in the Probate, Divorce & Admiralty Division of the High Court of Justice, Sept. 11 and 16, 1914.

Company, (4) an English firm claiming for disbursements, (5) an English firm claiming for brokerage and necessaries, and (6) an English firm claiming for necessaries.

The first question was as to the applicability of Article 3 of the Hague Convention VI (1907), which provides as follows:

"Enemy merchant ships which left their last port of departure before the commencement of the war, and are encountered on the high seas while still ignorant of the outbreak of hostilities may not be confiscated. They are merely liable to be detained on condition that they are restored after the war without payment of compensation; or to be requisitioned, or even destroyed, on payment of compensation, but in such case provision must be made for the safety of the persons on board as well as the preservation of the ship's papers.

"After touching at a port in their own country or at a neutral port, such ships are subject to the laws and customs of naval war."

As Germany had made a reservation with respect to the article above quoted, her subjects were held not to be entitled to any of its benefits. The decree, therefore, was that the vessel be condemned as lawful prize and sold. The same decision was reached, on the same ground, in *The Möwe*.[37]

A sale under a decree of condemnation in a prize court vests title absolutely in the purchaser, so that if the vessel subsequently comes into the ports of the country of her original owner, he cannot claim the vessel as his.[38] The taking of a prize to a neutral port, is not usual, but in such case, nevertheless, the prize court in the captor's country has jurisdiction to condemn or restore the vessel lying in the neutral port, provided the representative of the captor remains in possession of the captured vessel.[39]

Captures in war inure to the government of the captor, and can become private property only by its grant.[40] In England the proceeds of prize, after deduction of court costs and expenses, are distributed among officers and men of the capturing vessels as may be directed by Order in Council.[41] In the United States, all

[37][1915] P. 1.

[38]The Star (1818) 3 Wheat. 78; Williams *v.* Armroyd (1813) 7 Cranch, 423.

[39]Hudson *v.* Guestier (1808) 4 Cranch, 293; Williams *v.* Armroyd, *supra*; The Henrick and Maria (1799) 4 C. Rob. 43; The Comet (1804) 5 C. Rob. 285; The Polka (1854) Spinks, 57.

[40]The Manila Prize Cases (1902) 188 U. S. 254, 258; The Florida (1879) 101 U. S. 37, 42; The Siren (1871) 13 Wall. 389, 392; The Dos Hermanos (1825) 10 Wheat. 306; The Elsebe (1804) 5 C. Rob. 173, 181; The Maria Francoise (1806) 6 C. Rob. 282, 293.

[41]Stat. 27 & 28 Vict. (1864) c. XXIV, § 15.

provisions of law authorizing the distribution of the proceeds of prize among captors, or providing for the payment of bounty for the sinking or destruction of enemy vessels, have been repealed.[42]

The claim and appearance of the owner of *The Marie Glaeser* was stricken out on the authority of *The Chile*.[43] With respect to the shareholders,—whether enemy or British,—the Court held that their property must go with the capture of the enemy vessel,[44] and the same was held as to the British firms who had advanced money or supplied necessaries to the vessel. With respect to the claim of the Dutch mortgagee to be paid out of the proceeds of sale, the Court applied the principle that liens, even those claimed by a neutral, are lost by capture.

It is well settled that no liens on vessels or cargo, excepting only the lien for freight on enemy's goods seized on a neutral vessel, are recognized by a Prize Court. Liens are based on private contract, the captor has no access to the original agreement and no way of disproving a collusive lien, and in order that the right of capture may not become worthless, the capture acts on the property without regard to secret liens. Thus the following claims of lien have been denied: a mortgage held by the consul of a neutral sovereign, resident in the enemy's country;[45] a bottomry bond, held by a national of the captor and executed before the outbreak of war;[46] a lien claimed by a neutral for unpaid purchase money;[47] a mortgage held by a loyal citizen of the United States on a Confederate vessel;[48] a claim for repairs and supplies by loyal citizens;[49] money advanced by a neutral on enemy cargo;[50] a claim by a national of the captor for advances and factor's lien;[51] salvage claimed by a neutral;[52] a claim by a neutral for necessaries sup-

[42]Act of March 3, 1899, § 13.

[43]*Supra.*

[44]See The Vrow Elizabeth (1803) 5 C. Rob. 4; The Primus (1854) Spinks, 48; The Industrie (1854) Spinks, 54; The William Bagaley (1866) 5 Wall. 377.

[45]The Aina (1854) Spinks, 8.

[46]The Tobago (1804) 5 C. Rob. 218.

[47]The Marianna (1805) 6 C. Rob. 24.

[48]The Hampton (1866) 5 Wall. 372.

[49]The Battle (1867) 6 Wall. 498.

[50]The Carlos F. Roses (1899) 177 U. S. 655.

[51]The Frances (1814) 8 Cranch, 418.

[52]The Nigretia (1905) Takahashi, International Law Applied to the Russo-Japanese War, with the Decisions of the Japanese Prize Courts, pp. 551, 553, Russian and Japanese Prize Cases, Vol. 2, p. 208.

plied.[53] Even a seaman's lien for wages against an enemy vessel is not allowed.[54]

It is equally well settled that the lien for freight on enemy's goods seized on a neutral vessel is recognized by a Prize Court. In *The Ship Societe*[55] freight was allowed to the master of a Swedish ship on which British cargo had been seized by a United States vessel. In *The Antonia Johanna*[56] and *The Hazard*[57] freight was allowed to the master of a Russian ship on which British cargo had been seized by United States vessels. In *The Hoop*[58] freight was allowed to the master of a neutral vessel on cargo that was condemned for illegal trading with the enemy.[59] The charter-party rate of freight is not necessarily the rate enforced against the captor in such case, for the charter-party rate may be excessive on account of the hazardous nature of the voyage, due to the existence of war.[59a] The lien is not recognized, however, if the goods seized are contraband, or if the neutral vessel is carrying on the coasting trade of the enemy.[60] Where a neutral ship has been restored, and her master has been paid freight out of the proceeds of enemy's cargo, and the remnants of the proceeds are insufficient to satisfy the expenses of both master and captor, the captor is entitled to priority as to the remnants for his expenses.[61] The question of allowing freight on enemy goods seized on a neutral vessel is not likely to arise in the future in view of the practically universal adoption of the Declaration of Paris (1856) provision: "The neutral flag covers enemy's goods, with the exception of contraband of war."

In *The Marie Glaeser* the court pointed out that the Crown might, out of its bounty, deal favorably with the neutral and British claimants, if their claims were presented to the proper government officers, but the court rejected as matter of law all

[53]The Russia (1904) Takahashi, 557, Russian and Japanese Prize Cases, Vol. 2, p. 43.

[54]United States *v.* The Sally Magee (1866) 4 Int. Rev. Rec. 134, Fed. Cas. No. 16,216.

[55](1815) 9 Cranch, 209.

[56](1816) 1 Wheat. 159.

[57](1815) 9 Cranch, 205.

[58](1799) 1 C. Rob. 196, 219.

[59]See The Roumanian, *infra*, p. 333.

[59a]The Twilling Riget (1804) 5 C. Rob. 82.

[60]The Emanuel (1799) 1 C. Rob. 296.

[61]The Bremen Flugge (1801) 4 C. Rob. 90.

the claims to the proceeds of the vessel. A Prize Court must decide in accordance with the principles of prize law, and in a case involving hardship, any plea for leniency must be addressed, not to the court, but to the government of the captor.[62]

The next case, *The Tommi* and *The Rothersand,*[63] raised the question of the validity of a transfer of title to a belligerent merchant vessel to a neutral during a voyage. The German sailing vessel *Tommi,* of Hamburg, owned by a German company, left Dantzig in July, 1914, with a cargo consigned to an English company, and arrived at Gravesend August 5, the day after the declaration of war between Great Britain and Germany, where she was detained as prize. Similarly the German schooner *Rothersand,* owned by the same German company, was on August 5 detained as prize at Kirkcaldy, at which port she had arrived on August 3. On August 1, the day on which war was declared between Germany and Russia, both vessels were on the high seas. On that day the German company, the owner of the two vessels, cabled the claimant, an English Company, in which the German company held nine tenths of the stock, that the German company *sold* the two vessels to the English company, and asked for cabled acceptance. On the same day the English company cabled acceptance. War was declared between Great Britain and Germany at 11 P. M. August 4, 1914.

At the time of detention, the vessels had not been transferred to British registry. They were therefore at that time *entitled to fly* the German flag, and were not then entitled to fly the British flag. Their nationality was therefore German, and they were subject to seizure as lawful prize[64] by the rule of international law as understood prior to the Declaration of London. The nationality of a vessel is determined by the flag which she flies, regardless of the nationality of her owner.[65] This rule has been expressly incorporated in Article 57 of the Declaration of London as follows:

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[62]The Benito Estenger (1899) 176 U. S. 568, 575; The Hoop (1799) 1 C. Rob. 196; The Amado (1847) Newb. 400, 403, 404; The Rossia (1904) Russian and Japanese Prize Cases, Vol. 2, pp. 43, 45.

[63][1914] P. 251, in the Probate, Divorce & Admiralty Division of the High Court of Justice, Oct. 12 and 15, 1914.

[64]The decree was an order for detention, as in The Chile, *supra.*

[65]The Vrow Elizabeth (1803) 5 C. Rob. 4; The William Bagaley (1866) 5 Wall. 377, 410; The Hallie Jackson (1861) Blatchf. Prize Cases, 1, 42; The Amado (1847) Newb. 400, 404; The Telegrafo (1846) Newb. 383.

"Subject to the provisions respecting transfer to another flag, the neutral or enemy character of a vessel is determined by the flag which she is entitled to fly."

The Court also gave its opinion, though it stated it was not necessary to the decision, that the transfers, made while the vessels were in transit, were not valid because not *bona fide,* being manifestly intended, as the evidence clearly showed, merely to defeat the right of capture by a belligerent or belligerents when war was either an actual fact or imminent.

The sale of an enemy ship of war, lying in a neutral port, to a neutral, is invalid.[66] This is true even though the ship of war has been dismantled and fitted up as a merchant vessel prior to the sale to the neutral, and although the sale is *bona fide.*[67] The sale of an enemy merchant vessel to a neutral, made in anticipation of war and to escape the risk of war, is valid, if *bona fide.* This is true if the vessel is sold in port. It is also true if the vessel is sold while on a voyage, provided the voyage is ended and she comes into the possession of the purchaser before capture. The sale of an enemy merchant vessel to a neutral, during war, *flagrante bello,* is also valid if *bona fide,* provided the vessel is not purchased in a blockaded port.

In *The Ariel,*[68] a Russian ship owned by the Netherlands Consul at Riga, and lying at Libau, was sold March 18, 1854, to a Danish subject, one third of the purchase price being paid at the time of sale, one third to be paid in six months, and one third in nine months. War was declared between Great Britain and Russia March 29, 1854. In holding the transfer of title absolute, and the sale valid, although in anticipation of war, The Right Hon. Sir John Patteson stated the law as follows:[69]

"Their Lordships are of opinion, that there is abundant proof that the sale was made *imminente bello,* and in contemplation of it. Still, if the sale was absolute and *bona fide,* there is no rule of international law, as laid down by the Courts of this country, which makes it illegal. Such a *bona fide* sale made even *flagrante bello* would be legal, much more *imminente bello.*"

In *The Baltica,*[70] a Russian vessel was sold to a Danish subject, the vendor's son, March 17, 1854, *while on a voyage* from Libau to

[66]The Minerva (1807) 6 C. Rob. 396.
[67]The Georgia (1868) 7 Wall. 32.
[68](1857) 11 Moore P. C. 119.
[69]At p. 129.
[70](1857) 11 Moore P. C. 141.

Copenhagen. Part of the purchase money was paid at the time of sale, and the remainder was to be paid out of the earnings of the vessel. On arrival at Copenhagen, the purchaser took her and registered her under the Danish flag. She was subsequently seized at Leith. In holding the transfer of title absolute and the sale valid, The Right Hon. T. Pemberton Leigh said:[71]

"The general rule is open to no doubt. A neutral while a war is imminent, or after it has commenced, is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid, whether the subject of it be lying in a neutral port or in an enemy's port. During a time of peace, without prospect of war, any transfer which is sufficient to transfer the property between the vendor and the vendee, is good also against a Captor, if war afterwards unexpectedly break out. But, in case of war, either actual or imminent, this rule is subject to qualification, and it is settled that in such case a mere transfer by documents which would be sufficient to bind the parties, is not sufficient to change the property as against Captors, as long as the ship or goods remain *in transitu*."

In *The Johanna Emilie*,[72] a schooner owned by the Hanoverian Consul at Riga was transferred to a Hanoverian subject at Hanover on January 22, 1854, while lying at Newcastle. The evidence being unsatisfactory, the claimant was allowed to take further proofs. Dr. Lushington, however, said:[73]

"With regard to the legality of the sale, assuming it to be *bona fide*, it is not denied that it is competent to neutrals to purchase the property of enemies to another country, whether consisting of ships or anything else; they have a perfect right to do so, and no belligerent right can override it."

In *The Benito Estenger*,[74] a vessel owned by a Spanish subject, resident in Cuba, was transferred June 9, 1898 to a British subject, and was registered as a British vessel at Kingston, Jamaica. On June 27, 1898 she was captured at sea, flying the British flag, but with Spanish officers and crew, and her former owner on board as super-cargo. The court held on the evidence that the sale was not valid as not being absolute and not *bona fide*. Chief Justice Fuller stated the law as follows:[75]

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[71] At p. 145.

[72] (1854) Spinks, 12.

[73] At p. 16.

[74] (1900) 176 U. S. 568.

[75] At pp. 578, 579.

"Transfers of vessels *flagrante bello* were originally held invalid, but the rule has been modified, and is thus given by Mr. Hall, who, after stating that in France 'their sale is forbidden, and they are declared to be prize in all cases in which they have been transferred to neutrals after the buyers could have knowledge of the outbreak of the war;' says: 'In England and the United States, on the contrary, the right to purchase vessels is in principle admitted, they being in themselves legitimate objects of trade as fully as any other kind of merchandise, but the opportunities of fraud being great, the circumstances attending a sale are severely scrutinized, and the transfer is not held to be good if it is subjected to any condition or even tacit understanding by which the vendor keeps an interest in the vessel or its profits, a control over it, a power of revocation, or a right to its restoration at the conclusion of the war.' International Law, (4th ed.) 525. And to the same effect is Mr. Justice Story in his Notes on the Principles and Practice of Prize Courts, (Pratt's ed.) 63; 2 Wheat. App. 30: 'In respect to the transfers of enemies' ships during the war, it is certain that purchases of them by neutrals are not, in general, illegal; but such purchases are liable to great suspicion; and if good proof be not given of their validity by a bill of sale and payment of a reasonable consideration, it will materially impair the validity of a neutral claim; . . . and if after such transfer the ship be employed habitually in the enemy's trade, or under the management of a hostile proprietor, the sale will be deemed merely colorable and collusive. . . . Anything tending to continue the interest of the enemy in the ship vitiates a contract of this description altogether.' "

The burden of showing clearly the *bona fides* of the sale is on the claimant.[76] There must also be clear proof of payment of the purchase price.[77] It is not necessary that the *entire* purchase price be paid on the sale.[78] A voluntary transfer of a vessel by a father, an enemy, to his son, a neutral, having been agreed on seven months before war, as an advance of a portion of the latter's inheritance, being *bona fide,* was held valid although consummated only eleven days before the declaration of war.[79] The transfer

[76]The Bernon (1798) 1 C. Rob. 102; a French vessel sold during war to a citizen of the United States, resident in France, the vessel continuing in the hands of the former owners, condemned. The Ernst Merck (1854) Spinks, 98; a Russian ship transferred to a subject of Mecklenberg, March 13, 1854, condemned. The Benito Estenger, *supra.*

[77]The Johann Christoph (1854) Spinks, 60; a Russian ship transferred to her Danish master, condemned. The Rapid (1854) Spinks, 80; a Russian ship transferred to her Danish master, condemned. The Christine (1854) Spinks, 82; a Russian ship transferred to her master, condemned. The Ernst Merck, *supra.* The Benito Estenger, *supra.*

[78]The Ariel, *supra*; The Baltica, *supra.*

[79]The Benedict (1855) Spinks, 314.

of title must be absolute.[80] Thus where the enemy vendor retained an interest in the vessel, with a right to repurchase after the war, the transfer was held invalid and the vessel condemned.[81] A transfer of a vessel from an enemy to a neutral for the purpose of having the vessel continue in her former trade will not be recognized as a valid transfer.[82] Nor is a transfer valid where the management of the ship is retained by the vendor.[83] A transfer of an enemy vessel to a neutral in a blockaded port is invalid.[84]

Such is the law of England and the United States,—though not of France or Russia, which do not recognize a transfer after the outbreak of war,—as to the validity of transfer of title to enemy vessels, except in so far as it may now be modified by The Declaration of London. The pertinent sections of that declaration are as follows:

"Art. 55. The transfer of an enemy vessel to a neutral flag, effected before the outbreak of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences to which an enemy vessel, as such, is exposed. There is, however, a presumption, if the bill of sale is not on board a vessel which has lost her belligerent nationality less than sixty days before the outbreak of hostilities, that the transfer is void. This presumption may be rebutted.

"Where the transfer was effected more than thirty days before the outbreak of hostilities, there is an absolute presumption that it is valid if it is unconditional, complete, and in conformity with the laws of the countries concerned, and if its effect is such that neither the control of, nor the profits earned by, the vessel remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the outbreak of hostilities, and if the bill of sale is not on board, the capture of the vessel gives no right to damages.

"Art. 56. The transfer of an enemy vessel to a neutral flag effected after the outbreak of hostilities is void unless it is proved that such transfer was not made in order to evade the consequences to which an enemy vessel, as such, is exposed.

"Provided that there is an absolute presumption that a transfer is void—

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[80]The Benito Estenger, *supra.*

[81]The Sechs Geschwestern (1801) 4 C. Rob. 100.

[82]The Vigilantia (1798) 1 C. Rob. 1; The Embden (1798) 1 C. Rob. 16; The Ernst Merck (1854) Spinks, 98; The Benito Estenger (1900) 176 U. S. 568.

[83]The Jemmy (1801) 4 C. Rob. 31; The Bernon (1798) 1 C. Rob. 102; The Andromeda (1864) 2 Wall. 481; The Island Belle (1864) 21 Leg. Int. 60, Fed. Cas. No. 7107.

[84]The General Hamilton (1805) 6 C. Rob. 61.

"(1) If the transfer has been made during a voyage or in a blockaded port.

"(2) If a right to repurchase or recover the vessel is reserved to the vendor.

"(3) If the requirements of the municipal law governing the right to fly the flag under which the vessel is sailing have not been fulfilled."[85]

The United States Senate ratified the Declaration of London April 24, 1912. Great Britain has not ratified it. She has not followed its provisions as to absolute contraband, conditional contraband and goods not contraband. It is an open question whether Great Britain, not having ratified, will claim that the declaration is binding on the United States, and also whether the United States, having ratified, will claim that she is not bound by the declaration.

The position of the British Government, up to the present time, is this. It has recognized the transfer to a neutral flag of enemy ships belonging to companies which were incorporated in the enemy country, but all of whose shareholders are neutral; it has waived its objections to transfers from companies incorporated in the enemy country which were subsidiary to and owned by United States corporations, provided such vessels shall take no further part in trade with the enemy country.[86] It has objected in principle to the transfer of German ships, lying in United States ports, to citizens of the United States, but has indicated that it will waive its objections even to such transfers, provided such ships, when transferred, shall not be employed in German trade.

In *The Tommi,* the British company consisted of only five shareholders, namely, a German director in Germany, his wife, a German subject in England and his wife, and the German company itself. The Court stated, but did not decide, that even if the decree had been for the claimant on the first two points, it was not to be assumed that a Prize Court could not say that a British corporation consisting entirely of aliens could not own a British ship under the Merchant Shipping Act of 1894 and that under the circumstances these two vessels were German.

[85]The text of the Declaration of London, together with the general report thereon presented to the London Naval Conference on behalf of its drafting committee, appears in the Supplement to the American Journal of International Law for April, 1914, and in Stockton, Outlines of International Law, Appendix, IV. A general discussion of the provisions of the Declaration of London by James Brown Scott, appears in the American Journal of International Law, April and July, 1914.

[86]Note from Sir Edward Grey to Ambassador Page, Feb. 10, 1915.

It is not clear that a British corporation, consisting entirely of alien stockholders, may not own a British ship under § 1 of the Merchant Shipping Act of 1894. Supposing, however, that such a corporation could own and register a ship under British law, such ship would be a British ship. That the nationality of a corporation is that of the state under whose laws it is incorporated was held in *The Pedro* and *The Guido,*[87] in which cases vessels, owned by a corporation incorporated under the laws of Spain, were held to be Spanish vessels, although British subjects were the legal owners of some and the equitable owners of the rest of the stock of the corporation. In *The Manchuria*[87a] a vessel owned by a Russian corporation and flying the Russian flag was held to be a Russian (enemy) ship, although the majority of the shareholders were Danish (neutral) subjects. In *Nigel Gold Mining Co., Ltd.,* v. *Hoade,*[88] it was held that a company incorporated under the laws of the British Colony of Natal was an English corporation and therefore not an enemy, although its business was entirely within the South African Republic. In *Robinson Gold Mining Co.* v. *Alliance Insurance Co.,*[89] in the Commerce Court, it was held that a company formed of British capital, incorporated under the laws of the South African Republic, was a national of that state and therefore an enemy. In *Driefontein Consolidated Gold Mines, Ltd.,* v. *Janson,*[90] in the Court of Appeal, it was held by Vaughan Williams, L. J., and Romer, L. J., that a company incorporated under the laws of the South African Republic was an enemy, although none of the shareholders of the company were subjects of the Government of the Transvaal.[91]

This question arose again in the case of *The Roumanian,*[92] where a cargo of refined petroleum oil in bulk, owned by a Bremen company, incorporated under the laws of Germany, and shipped before the outbreak of the war at Port Arthur, Texas, on a British vessel bound for Hamburg, was seized in the harbor of Purfleet. Neutral bodies and subjects were shareholders in the company to a considerable extent. The Court held that the cargo was enemy

[87] (1899) 175 U. S. 354, and 382.

[87a] (1905) Russian and Japanese Prize Cases, Vol. 2, p. 52.

[88] [1901] 2 K. B. 849.

[89] [1901] 2 K. B. 919

[90] [1901] 2 K. B. 419.

[91] The opinion of A. L. Smith, M. R., was *contra* on this point.

[92] [1915] P. 26, in the Probate, Divorce & Admiralty Division of the High Court of Justice, Dec. 7, 1914.

property, and it was condemned as such. The vessel was owned by a British company and flew the British flag. The vast majority of the shares in the steamship company were owned by the German company which owned the cargo, but there were also English shareholders and English directors, and its business was carried on in England. The Crown, without admitting liability, consented to payment of freight *pro rata itineris* to the steamship company.

The neutral nationality of a vessel as determined by the flag which she flies is not lost by the fact that at the time of capture she is under time charter to an enemy citizen or subject.[93] Her neutral flag will not protect her from condemnation, however, if she is captured while under charter to the enemy government,[94] or is engaged in unneutral service.[95]

On this point the Declaration of London, under the heading of Unneutral Service, provides in Article 46 as follows:

"A neutral vessel is liable to condemnation and, in a general way, to the same treatment as would be applicable to her if she were an enemy merchant vessel—

"(1) If she takes a direct part in the hostilities.

"(2) If she is under the orders or control of an agent placed on board by the enemy government.

"(3) If she is in the exclusive employment of the enemy government.

"(4) If she is exclusively engaged at the time either in the transport of enemy troops or in the transmission of intelligence in the interest of the enemy.

"In the cases covered by the present article, goods belonging to the owner of the vessel are likewise liable to condemnation."

The question of the exemption of enemy's fishing vessels was the next to be decided, in *The Berlin*.[96] On August 5, 1914,

[93]The Thea (1904) Russian and Japanese Prize Cases, Vol. 1, pp. 96, 108, in the Russian Supreme Prize Court. A German vessel chartered to a Japanese steamship company, restored.

[94]The Quang-Nam (1906) Russian and Japanese Prize Cases, Vol. 2, p. 343, in the Japanese Higher Prize Court. A French vessel chartered to the Russian Government, condemned. The Australia (1906) Russian and Japanese Prize Cases, Vol. 2, p. 373, in the Japanese Higher Prize Court. A United States vessel, chartered to the Russian Government, condemned.

[95]The Nigretia (1905) Russian and Japanese Prize Cases, Vol. 2, p. 201, in the Japanese Higher Prize Court. A British vessel, chartered to a Russian subject, condemned on account of knowingly carrying contraband persons to an enemy port.

[96][1914] P. 265, in the Probate, Divorce & Admiralty Division of the High Court of Justice, Oct. 29, 1914.

The Berlin, a German drift fishing sailing cutter of 110 metric tons, of Emden, owned by the Emden Herring Fishing Company, was captured 100 miles from the English coast and 500 miles from her home port. She carried a crew of 15 men, together with fish, salt, nets and stores. It appeared from her log that she had been on a fishing voyage in the North Sea. No claim was made on behalf of the vessel. The question was whether the vessel was immune from capture as a coast fishing vessel. The Court held that *The Berlin* did not come within the exempted class, and condemned both vessel and cargo.

The United States Supreme Court in *The Paquete Habana and The Lola*[97] reviewed the history of this question at length, showing that by ancient usage among civilized nations, beginning at least as far back as 1403 in an order of Henry IV of England to his admirals, which gradually developed into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war. The Court pointed out, however, that the exemption does not apply to coast fishermen or their vessels, if employed for a warlike purpose or in giving aid or information to the enemy, nor when military or naval operations create a necessity to which all private interests must give way; nor does the exemption extend to ships employed on the high sea in catching whales, seals, cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce. The Court restored, with damages and costs, both fishing smacks, which operated from Havana under the Spanish flag and were owned by Spaniards, resident in Cuba, and were regularly engaged in fishing on the coast of Cuba, and which carried neither arms nor ammunition.

In *The Michael*[98] and *The Alexander,*[99] decisions of the Sasebo Prize Court affirmed by the Higher Prize Court, it was held, as in *The Berlin,* that vessels owned by an enemy corporation and engaged in deep-sea fishing, are not exempt from capture as prize under international law. In *The Lesnik,*[100] the Japanese Prize Court at Sasebo condemned a whaler, owned by a Russian subject.

In *The Manila Prize Cases*[101] the Supreme Court held that the

[97] (1900) 175 U. S. 677.
[98] (1904) Russian and Japanese Prize Cases, Vol. 2, p. 80.
[99] (1904) Russian and Japanese Prize Cases, Vol. 2, p. 86.
[100] (1904) Russian and Japanese Prize Cases, Vol. 2, p. 92.
[101] (1902) 188 U. S. 254, 278, 279.

principle of the decision in *The Paquete Habana* covers small native boats, *e. g.* barges and derricks, the property of private citizens, captured in their home ports. Article XXXV of the Japanese regulations governing captures at sea, issued to take effect March 15, 1904, specifically exempted vessels employed for coast fishery, vessels making voyages for scientific, philanthropic, or religious purposes, light-house vessels and tenders, and vessels employed for exchange of prisoners.[102]

The Hague Convention VI (1907), Article 3, dealing with the question of coast fishing vessels is as follows:

"Vessels employed exclusively in coast fisheries, or small boats employed in local trade, are exempt from capture, together with their appliances, rigging, and cargo. This exemption ceases as soon as they take any part whatever in hostilities. The contracting Powers bind themselves not to take advantage of the harmless character of the said vessels in order to use them for military purposes while preserving their peaceful appearance."

In *The Berlin,* the Court expressly refused to pronounce whether or not German subjects would, in the circumstances of the present war, have the right to claim the benefit of the Hague Conventions, but pointed out that, in any event, a belligerent might by naval order exclude *all* coastal fishing vessels from immunity if there was reason for believing that some of them were being used for aiding the enemy.

If, as is reported, British trawlers have been armed for offensive action against German submarines, and German trawlers have been used in transporting mines, both British and German trawlers as a class have lost the privilege of exemption from capture.

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[102]Takahashi, 783, Russian and Japanese Prize Cases, Vol. 2, p. 430.